

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JESSE B. FOWLER,

Defendant-Appellant.

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UNPUBLISHED

December 11, 2003

No. 242476

Wayne Circuit Court

LC No. 00-004118

Before: Cavanagh, P.J., and Jansen and O’Connell, JJ.

PER CURIAM.

Defendant was convicted by a jury of unlawful possession of 50 grams or more, but less than 225 grams of cocaine, MCL 333.7403(2)(a)(iii). Defendant was sentenced to thirty-six months to twenty years’ imprisonment. Defendant appeals as of right. We affirm.

Defendant first contends that the trial court should have granted his motion for mistrial because the prosecutor’s misconduct denied him a fair trial. This Court reviews a trial court’s decision on a motion for mistrial for an abuse of discretion. *People v Ortiz-Kehoe*, 237 Mich App 508, 513; 603 NW2d 802 (1999). Prosecutorial misconduct is a constitutional claim that this Court reviews de novo. *People v Pfaffle*, 246 Mich App 282, 288; 631 NW2d 162 (2001). Claims of prosecutorial misconduct are reviewed case by case reviewing the challenged remarks in context to determine whether the defendant was deprived of a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 537 NW2d 659 (1995).

Defendant argues that the prosecutor made an impermissible civic duty argument during closing arguments. A prosecutor may not urge a jury to convict a defendant as part of its civic duty, because this injects issues into the trial that are broader than a defendant’s guilt or innocence. *Bahoda*, *supra* at 282-284; *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003). The prosecutor’s remarks in this case did constitute an impermissible civic duty argument. The prosecutor discussed the effects of crack cocaine on society and attempted to appeal to the jury’s sympathy and fear. However, a civic duty argument can be cured by a cautionary instruction, as given here, that “arguments of counsel are not evidence.” See *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). In addition, the jury found defendant guilty of the lesser offense of possession of cocaine. Therefore, the prosecutor’s remarks with respect to drug dealers did not prejudice the jury. Defendant was not deprived of a fair trial, and the trial court did not abuse its discretion by denying his motion for mistrial.

Defendant also contends that the prosecutor made improper remarks regarding what police officers go through every day and that they should, therefore, be more credible. Defendant failed to object to this remark, so we review the claim for plain error affecting defendant's substantial rights. *People v Schutte*, 240 Mich App 713, 720; 612 NW2d 370 (2000).

A prosecutor may not vouch for the credibility of a witness to the effect that he has some special knowledge that the witness is testifying truthfully. *Bahoda, supra* at 276. However, it is not improper for a prosecutor to comment on a witness' credibility during closing arguments or to suggest a witness is telling the truth. *People v Stacy*, 193 Mich App 19, 36-37; 484 NW2d 675 (1992). The prosecutor, in this case, stated the following:

Narcotics officers who execute narcotics search warrants, they risk their lives every single day that they do this on the war against drugs. They risk their lives when they go in those houses. They don't know what's behind that door. They don't know if there will be people in there high on drugs with guns and this, that happens often. There are often guns found in drug houses. They don't know. And they risk their lives and they have families. And they do this every day. But he wants you to believe they're liars. You are the judges of credibility.

The prosecutor was merely responding to defendant's claims that the large piece of cocaine was not his and that it was not found underneath him. Defendant's testimony contradicted the officers' account of the incident. The prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case. *Bahoda, supra* at 282; *Schutte, supra*.

This Court in *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001), found that the prosecutor's comments constituted improper vouching when the prosecutor vouched for the credibility of the complainant during closing argument, stating "[y]ou have his honest, painful, straightforward testimony about what this man made him do – and that is enough." *Id.* The prosecutor's comments in the present case do not rise to the level of those in *Knapp, supra*. The prosecutor did not imply that he had special knowledge that the witnesses were testifying truthfully but, rather, was commenting on defendant's claim of fabrication on behalf of the police officers. It was not improper for the prosecutor to comment on the witnesses' credibility in this way. We find that the prosecutor's comment did not constitute plain error affecting defendant's substantial rights.

Defendant next argues that the trial court erred by denying his motion to quash the search warrant for his home. We disagree.

A reviewing court must look at the affidavits and determine whether the information contained in the documents could have caused a reasonably cautious person to conclude that, under the totality of the circumstances, there was a substantial basis of probable cause to conclude that the evidence sought might be found in a specific location. *People v Whitfield*, 461 Mich 441, 446; 607 NW2d 61 (2000). The warrant and underlying affidavit are to be read in a realistic and common sense manner, and deference is given to the magistrate's determination. *Whitfield, supra* at 446. Review is limited to those facts that were presented to the magistrate and contained on the record. *People v Sloan*, 450 Mich 160, 168, 172-173; 538 NW2d 380

(1995), overruled in part on other grounds in *People v Wagner*, 460 Mich 118; 594 NW2d 487 (1999), and overruled in part on other grounds in *People v Hawkins*, 468 Mich 488; 688 NW2d 488 (2003).

While conducting a trash pull at defendant's home, the officers found baggies with cocaine residue in them, burnt pieces of crack-pipe, and burnt crack-pipe filters. They also found registered mail addressed to defendant. The garbage pull was completed on the same day as execution of the search warrant. Based on these facts, a reasonably cautious person could have concluded that there was a substantial basis of probable cause to conclude that drugs would be found at defendant's home. Therefore, the trial court did not err by denying defendant's motion.

Defendant also argues that the trial court's comments during trial deprived him of a fair and impartial trial. We disagree.

In *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995), citing *People v Collier*, 168 Mich App 687, 697-698; 425 NW2d 118 (1988), this Court stated:

A trial court has wide, but not unlimited discretion and power in the matter of trial conduct. Portions of the record should not be taken out of context in order to show trial court bias against defendant; rather the record should be reviewed as a whole. A trial court's conduct pierces the veil of judicial impartiality where its conduct or comments unduly influence the jury and thereby deprive the defendant of a fair and impartial trial.

"A party that challenges a judge for bias must overcome a heavy presumption of judicial impartiality." *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). "[P]artiality is not established by expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women sometimes display." *People v McIntire*, 232 Mich App 71, 105; 591 NW2d 231 (1998), reversed on other grounds 461 Mich 147; 599 NW2d 102 (1999).

The trial court's comments, while somewhat critical, do not show bias and did not unduly influence the jury and deprive defendant of a fair and impartial trial. In addition, the trial judge instructed the jury that his comments were not evidence and that if they believed he had an opinion about the case, they should pay no attention to it. In light of this curative instruction, the trial court's comments cannot be said to have unduly influenced the jury and deprived defendant of a fair and impartial trial because juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant additionally argues that the trial court's questioning of the prosecution's witness deprived him of a fair and impartial trial. We disagree. "While a trial court may question witnesses to clarify testimony or elicit additional relevant information, the trial court must exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair, or partial." *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996), citing *People v Conyers*, 194 Mich App 395, 404-405; 487 NW2d 787 (1992). "The test is whether the judge's questions and comments may have unjustifiably aroused suspicion in the mind of the jury concerning a witness' credibility and whether partiality quite

possibly could have influenced the jury to the detriment of defendant's case." *Cheeks, supra* at 480.

Because defendant did not object to the trial court's questions, this issue is unpreserved. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). This Court reviews unpreserved claims for plain error affecting the defendant's substantive rights. *People v Carines*, 460 Mich 750, 763-766; 597 NW2d 130 (1999). The trial court's questions here merely elicited relevant testimony and did not demonstrate partiality. Defendant has failed to show plain error affecting his substantial rights.

Finally, defendant argues that the trial court abused its discretion in admitting photographs of the evidence seized because they were cumulative. We disagree. A trial court's admission of photographic evidence is reviewed for an abuse of discretion. *People v Anderson*, 209 Mich App 527, 536; 531 NW2d 780 (1995). An abuse of discretion exists only when an unprejudiced person, considering facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999).

"All relevant evidence is admissible" MRE 402. "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. The photographs of the scale, drugs, and drug paraphernalia were relevant because they had a tendency to make it more likely that defendant possessed the crack cocaine and intended to deliver it. Under MRE 403, "relevant evidence may be excluded if it's probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403. The photographs allowed the jurors to see the location of each of the items within the house, including the crack cocaine found underneath defendant. The witness testified that the photographs showed the location where the seized items were found and the condition they were in before being touched by the officers. Therefore the evidence was not cumulative and should not have been excluded under MRE 403, as its probative value was not substantially outweighed by the danger of unfair prejudice or needless presentation of cumulative evidence. Accordingly, the trial court did not abuse its discretion in admitting the photographs.

Affirmed.

/s/ Mark J. Cavanagh  
/s/ Kathleen Jansen  
/s/ Peter D. O'Connell